IN THE HIGH COURT OF JUDICATURE AT PATNA
CR. REV. No.550 of 2005
PRAMOD NARAYAN SHAH
Versus
THE STATE OF BIHAR & ORS.

For the petitioner : Mr. Vishwanath Prasad Sinha,
Sr. Advocate.
M/s Sanjay Kr. Singh &
Yugal Kishore, Advocates.

For the Opposite Parties : M/s Gopesh Kumar, A.P.P. &
Pankaj Kumar Das, Adv.

07/ 21.08.2008 This petition has been filed against the order dated 07.06.2005 passed by Sub-Divisional Magistrate, Darbhanga in M.R. No. 748 of 2001, thereby and thereunder, the attachment order passed earlier under section 146(1) of the Code of Criminal Procedure has been recalled.

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Heard learned counsel for both the parties.

The submission of the learned counsel for the petitioner is that once an attachment order is passed under section 146(1) of the Code of Criminal Procedure, it cannot be recalled by the Magistrate unless he comes to the conclusion that apprehension of breach of peace between the parties no longer exists. In other words, it can be withdrawn only after conclusion of the proceeding otherwise, it would amount to dropping of the proceeding also. In support of his contention he has relied upon a Full Bench decision of this court reported in 1979 B.B.C.J. 395(Gaya Singh and Others Vs. Doman Singh).

Considered the submissions of the learned counsel for the petitioner and perused the judgment rendered by Full Bench in a

case mentioned above. Proviso to section 146(1) of the Code of Criminal Procedure provides for withdrawal of the attachment order at any time if the Magistrate is satisfied that there is no longer any likelihood of breach of peace with regard to subject of dispute. This proviso has been considered in the aforesaid Full Bench decision. In paragraph-5 , it has been observed as follows:

> "The proviso of the new sub-section(1) of section 146 is the same as it was prior to 1955 vesting the power in the Magistrate to withdraw the attachment at any time if he is satisfied that there is no longer likelihood of breach of the peace with regard to the subject of dispute. Madan Mohan Prasad J. in the order of reference, in view of this proviso has observed that in emergency cases the same Magistrate can withdraw the order of attachment and can proceed with the hearing of the case. With great respect, I may point out this conclusion would have followed if in the proviso instead of the words, likelihood of breach of the peace " the word 'have been" emergency." If there is no longer any likelihood of breach of the peace there is no question of hearing the proceeding, because in view of sub-section(5) of section 145, the Magistrate has to cancel his order initiating the proceeding under section 145 itself. Existence of apprehension of breach of the peace with regard to the subject of dispute is the foundation of his jurisdiction to proceed with the case."

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From the above decision, it is quite apparent that an attachment order once passed on the ground of existence of emergency, can not be withdrawn so long the proceeding is pending. In case the Magistrate withdraws the attachment in the midst of the proceeding, he has also to cancel and drop the proceeding. In this case, while recalling the attachment order, the Magistrate has also proceeded to

hear the proceeding. In view of above decision, this is self contradictory.

Learned counsel for both the parties admit that the dispute with regard to actual possession over the disputed land still exists. In other words, the apprehension of breach of peace still exists between the parties over the land in question.

In the result, this application is allowed. The order in question, so far it relates to withdrawal of attachment order is hereby set aside. The Magistrate is directed to dispose of the proceeding finally within four months of the receipt of the order.

harish/ **(Ghanshyam Prasad, J.)**

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